No. 89-6363 (3)

IN THE

Supreme Court of the United States

OCTOBER TERM, 1989

MARK HOWLETT, a minor by and through Elizabeth Howlett, his mother, natural guardian and friend,
Petitioner,

v.

SCOTT ROSE, as Superintendent of Schools for Pinellas County, Florida; WILLIAM GREY, THOMAS PETIT, and THE SCHOOL BOARD OF PINELLAS COUNTY, FLORIDA,
Respondents.

On Writ Of Certiorari To The District Court of Appeal Of Florida Second District

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PETITIONER'S BRIEF

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QUESTION PRESENTED

Whether the Supremacy Clause is violated by Florida's decision to shield a local school board and its officials from liability under 42 U.S.C. § 1983 by enforcing, in its state courts, a rule of state sovereign immunity that is not recognized by federal law and that would not apply if the very same lawsuit were brought in federal court?

TABLE OF CONTENTS

	Page
TABLE OF AUTHORITIES	iii
OPINIONS BELOW	1
JURISDICTION	1
STATUTES INVOLVED	1
STATEMENT OF THE CASE	1
SUMMARY OF ARGUMENT	5
ARGUMENT	7
I. THE SCOPE OF ANY IMMUNITY DEFENSE UNDER § 1983 IS GOVERNED BY FEDERAL LAW REGARDLESS OF THE FORUM IN WHICH THE CASE IS BROUGHT	7
A. The Decision Below Is Inconsistent With The Established Precedents Of This Court	8
B. Respondents Would Not Be Shielded By A Sovereign Immunity Defense In Federal Court	11
C. The Decision Below Is Inconsistent With The History And Purposes Of § 1983	13
II. THE DECISION BELOW MUST BE REVERSED EVEN IF IT IS VIEWED AS A JURISDICTIONAL BAR TO § 1983 SUITS IN THE STATE COURTS	16
A. The Decision Below Does Not, On Its Face, Foreclose Jurisdiction Over § 1983 Claims	16
B. States May Not Enforce Jurisdictional Rules That Discriminate Against Federal Claims	20
C. States May Not Enforce Jurisdictional Rules That Reflect A Substantive Disagreement With Policies Inherent In Federal Law	23
CONCLUSION	29
APPENDIX	1a

TABLE OF AUTHORITIES

Cases	Page
Atascadero State Hospital v. *Scanlon*, 473 U.S. 234 (1985)	26
Bethel School District v. *Fraser*, 478 U.S. 675 (1986)	12
Board of Education v. *Pico*, 457 U.S. 853 (1982)	12
Briscoe v. *LaHue*, 460 U.S. 325 (1983)	10
Brown v. *Western Ry.*, 338 U.S. 294 (1949)	11
Carpenter v. *City of St. Petersburg*, 547 So.2d 339 (2d DCA 1989)	19
City of Riviera Beach v. *Langevin*, 522 So.2d 857 (4th DCA 1988)	18
Claflin v. *Houseman*, 93 U.S. 130 (1876)	24
Conley v. *Gibson*, 355 U.S. 41 (1957)	1
County of Lincoln v. *Luning*, 133 U.S. 529 (1890)	11
Dice v. *Akron, Canton & Youngstown Railroad Co.*, 342 U.S. 359 (1952)	27
Edelman v. *Jordan*, 415 U.S. 651 (1974)	17
Ex Parte Young, 209 U.S. 123 (1908)	13, 25
Federal Energy Regulatory Commission v. *Mississippi*, 456 U.S. 742 (1982)	22, 24
Felder v. *Casey*, 108 S.Ct. 2302 (1988)	*passim*
Fitzpatrick v. *Bitzer*, 427 U.S. 445 (1976)	10
Fletcher v. *Williams*, 153 So.2d 759 (1st DCA 1963)	1
Florida Dep't of Health and Rehabilitative Services v. *Florida Nursing Home Ass'n*, 450 U.S. 147 (1981)	18
Forrester v. *White*, 108 S.Ct. 538 (1988)	7
Gamble v. *Florida Dep't of Health and Rehabilitative Services*, 779 F.2d 1509 (11th Cir. 1986)	20
Garrett v. *Moore-McCormack Co.*, 317 U.S. 239 (1942)	6, 11
General Oil v. *Crain*, 209 U.S. 211 (1908)	7, 24, 26
Guaranty Trust Co. v. *York*, 326 U.S. 99 (1945)	15
Gulf Offshore Co. v. *Mobil Oil Corp.*, 453 U.S. 473 (1981)	27
Hampton v. *City of Chicago*, 484 F.2d 602 (7th Cir. 1973), *cert. denied*, 415 U.S. 917 (1974)	8, 10
Harlow v. *Fitzgerald*, 457 U.S. 800 (1982)	7
Hazelwood School District v. *Kuhlmeier*, 484 U.S. 260 (1988)	12

Table of Authorities Continued

	Page
Hill v. *Dep't of Corrections*, 513 So.2d 129 (1987), *cert. denied*, 108 S.Ct. 1024 (1988)	*passim*
Hoffmeister v. *Coler*, 544 So.2d 1067 (4th DCA 1989)	20
Imbler v. *Pachtman*, 424 U.S. 409 (1976)	7
Kentucky v. *Dennison*, 65 U.S. 66 (1861)	24
Kentucky v. *Graham*, 473 U.S. 159 (1985)	13
Lloyd v. *Ellis*, 520 So.2d 59 (1st DCA 1988)	18
Maine v. *Thiboutot*, 448 U.S. 1 (1980)	11, 23, 27
Martinez v. *California*, 444 U.S. 277 (1980)	*passim*
McKnett v. *St. Louis & S.F. Railway*, 292 U.S. 230 (1934)	21, 22, 23
Mondou v. *New York, N.H. & H. R.R.*, 223 U.S. 1 (1912)	7, 23, 25
Monell v. *Dep't of Social Services*, 436 U.S. 658 (1978)	*passim*
Monroe v. *Pape*, 365 U.S. 167 (1961)	7
Mt. Healthy City Board of Ed. v. *Doyle*, 429 U.S. 274 (1977)	11, 12
Owen v. *City of Independence*, 445 U.S. 622 (1980)	*passim*
P.C.B. Partnership v. *The City of Largo*, 549 So.2d 738 (2d DCA 1989)	19
Patsy v. *Florida Board of Regents*, 457 U.S. 496 (1982)	14
Penthouse, Inc. v. *Saba*, 399 So.2d 456 (2d DCA 1981)	19
Pierson v. *Ray*, 386 U.S. 547 (1967)	7
Scheuer v. *Rhodes*, 416 U.S. 232 (1974)	7, 10
Shinholster v. *Graham*, 527 F.Supp. 1318 (N.D.Fla. 1981)	21
Skoblow v. *Ameri-Manage, Inc.*, 483 So.2d 809 (3d DCA 1986), *aff'd on other grounds*, 514 So.2d 1077 (1987)	19
Smith v. *Wade*, 461 U.S. 30 (1983)	11
Southern Alliance Corp. v. *City of Winter Haven*, 505 So.2d 489 (2d DCA 1987)	18
Steinberg v. *City of Sunrise*, 545 So.2d 424 (4th DCA 1989)	20
Testa v. *Katt*, 330 U.S. 386 (1947)	6, 21, 23
The Franklin County School Board v. *Page*, 540 So.2d 891 (1st DCA 1989)	18, 20
Tinker v. *Des Moines Independent Community School District*, 393 U.S. 503 (1969)	12

Table of Authorities Continued

	Page
United States v. *Classic*, 313 U.S. 299 (1941)	14
Will v. *Michigan Dep't of State Police*, 109 S.Ct. 2304 (1989)	*passim*
Wilson v. *Garcia*, 471 U.S. 261 (1985)	10
Wood v. *Strickland*, 420 U.S. 308 (1975)	7

STATUTES AND REGULATIONS

28 U.S.C. § 1257(a)	1
42 U.S.C. § 1983	*passim*
42 U.S.C. § 1988	10, 20
Dictionary Act, 16 Stat. 431 (Feb. 25, 1871)	12
Federal Employers' Liability Act, 45 U.S.C. § 51, *et seq*	21, 22, 24, 27
Fla.Stat. § 236.25	13
Fla.Stat. § 236.37	13
Fla.Stat. § 768.28	*passim*

OTHER AUTHORITIES

Bator, Meltzer, Mishkin & Shapiro, *Hart and Wechsler's Federal Courts and the Federal System* (1988)	23
Gordon & Gross "Justiciability of Federal Claims in State Court," 59 Notre Dame L.Rev. 1145 (1984)	23
Herman, "Beyond Parity: Section 1983 and the State Courts," 54 Brooklyn L.Rev. 1057 (1989)	10, 16
Neuborne, "Toward Procedural Parity in Constitutional Litigation," 22 Wm. & Mary L.Rev. 725 (1981)	23
Steinglass, "The Emerging State Court § 1983 Action: A Procedural Review," 38 Miami L.Rev. 381 (1984)	27
Steinglass, *Section 1983 Litigation in State Courts* (1988)	7, 23

OPINIONS BELOW

The orders of the Circuit Court for Pinellas County dismissing petitioner's complaint with prejudice, (J.A.19), and denying rehearing, (J.A.23), are unreported. The opinion of the District Court of Appeal for the Second District, (Pet.App.1), is reported at 537 So.2d 706 (2d DCA 1989). The order of the Florida Supreme Court denying discretionary review, (Pet.App.4), is reported at 545 So.2d 1367 (1989).

JURISDICTION

The order of the Florida Supreme Court was entered on May 17, 1989, and the petition for a writ of *certiorari* was granted on November 13, 1989. The jurisdiction of this Court is invoked under 28 U.S.C. § 1257(a).

STATUTES INVOLVED

The appendix to this brief contains the relevant text of the following statutes and constitutional provisions: Article VI of the United States Constitution; 42 U.S.C. § 1983; and Fla.Stat. § 768.28.

STATEMENT OF THE CASE

Petitioner Mark Howlett was a student in good standing at St. Petersburg High School in Pinellas County, Florida, when he drove his 1966 Volkswagen to school on the morning of October 9, 1986. (J.A.4).[1] The car was legally parked and locked on school property. *Id.* Apparently, it was also blocking the path of several construction vehicles temporarily working nearby. (J.A.5). When this

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[1] Citations are to petitioner's complaint, which must be accepted as true in reviewing the grant of a motion to dismiss under both Florida and federal law. *See Fletcher* v. *Williams*, 153 So.2d 759 (1st DCA 1963); *Conley* v. *Gibson*, 355 U.S. 41 (1957).

fact was discovered later in the morning, Thomas Petit, an assistant principal at the school and respondent herein, was summoned to the parking lot. He promptly broke into petitioner's car through the side vent window, ostensibly to look for registration papers and identify the driver. (J.A.4).

The record does not explain why Petit chose to break into petitioner's car rather than broadcast its license plate number over the school's public address system. (J.A.5-6). The record also does not explain why Petit continued to search petitioner's car even after finding the registration papers he was seeking. (J.A.4). What is clear is that, as a result of his search, Petit discovered and seized four bottles from petitioner's car: three were empty wine cooler bottles; the fourth contained an unconsumed residue of eggnog that Petit believed might have some alcohol in it. (J.A.5).[2] Based solely on this "evidence," petitioner was immediately suspended from regular classes for five days under a school rule that prohibits students from drinking or possessing alcoholic beverages on school premises. (J.A.6).

Shortly thereafter, petitioner filed this action in the Florida state courts alleging, *inter alia*, a violation of his constitutional rights under 42 U.S.C. § 1983.[3] The complaint contained three counts. In the first count, petitioner alleged that respondents violated his Fourth Amendment right to be free from unreasonable searches and seizures. (J.A.6). In the second count, petitioner alleged that his suspension was unsupported by any credible evidence and thus violated the substantive due process guarantees of the Fourteenth Amendment. (J.A.8-9). In the third count, petitioner alleged that his procedural due process rights were abridged by the absence of any meaningful hearing. (J.A.10). As relief, petitioner sought compensatory and punitive damages. He also sought injunctive relief, including a request to expunge any reference to the suspension from his school records.

In lieu of an answer, respondents filed a motion to dismiss. The motion was granted by the Circuit Court in a one sentence order, (J.A.19),[4] and then affirmed by the District Court of Appeal in a brief two page opinion. (Pet.App.1). Both courts relied heavily on *Hill* v. *Dep't of Corrections*, 513 So.2d 129 (1987), *cert. denied*, 108 S.Ct. 1024 (1988), a decision of the Florida Supreme Court which holds that the state itself may not be sued in a § 1983 action in the state courts. Construing *Hill* in the broadest possible fashion, the District Court of Appeal wrote:

> . . . to the extent that the actions of the state and its agencies are protected by sovereign immunity, an action pursuant to section 1983 will not lie in state courts. The question of whether that sovereign immunity exists is a question of state law and not federal law.

(Pet.App.2).

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[2] Petit's suppositions about the eggnog were never verified. (J.A.28-29).

[3] The complaint alleged that respondent Petit was acting at all material times "under the authority conferred upon" him by his superiors. (J.A.5). The complaint therefore named as additional defendants: the Pinellas County School Board; Scott Rose, the Superintendent of Schools for Pinellas County; and William Grey, the principal of St. Petersburg High School.

[4] Petitioner's request for rehearing was denied without opinion. (J.A.23).

The court recognized that its ruling might lead to different results depending on whether a § 1983 action is brought in state or federal court. It concluded, however, that such asymmetrical outcomes were not a cause for concern:

> Under the eleventh amendment, when a section 1983 action is brought against a state in *federal court*, the question is whether the defendant qualifies as a "person" under the act or is more properly an Eleventh Amendment protected state agency. The determination of *that* question in *that* context is a question of federal law. *However*, when a section 1983 action is brought in *state* court, the sole question to be decided on the basis of *state* law is whether the state has waived its common law sovereign immunity to the extent necessary to allow a section 1983 action in state court. *Hill* holds that Florida has not so waived its sovereign immunity. We therefore do not reach appellant's second issue in this case, i.e., whether under *federal* law a Florida school board is immune from a section 1983 law [sic]. There is no question under Florida law that agencies of the state, including school boards and municipalities, are the beneficiaries of sovereign immunity.

(Pet.App.3) (emphasis in original).[5]

Petitioner appealed to the Florida Supreme Court, arguing that the decision of the District Court of Appeal

[5] Petitioner raised three issues on appeal in the Florida courts: (1) whether the scope of sovereign immunity in a § 1983 action brought in state court is a question of state or federal law; (2) whether federal law immunizes a local school board from suit under § 1983; and (3) whether it is necessary to exhaust administrative remedies before bringing a § 1983 action for damages in the Florida courts. (Pet.App.2). Only the first issue was reached by the court below. As indicated above, its disposition of that issue was sufficient to dispose of the case in respondents' favor.

was inconsistent with § 1983 and misapplied *Hill*. With one judge dissenting, the Florida Supreme Court denied discretionary review. (Pet.App.4).

SUMMARY OF ARGUMENT

The issue in this case is whether a state may provide its local governmental units with an absolute immunity against § 1983 actions brought in state court that is clearly inconsistent with, and less generous than, the immunity rules applied to § 1983 actions in federal court. This seemingly technical inquiry has important substantive consequences. If respondents prevail, the outcome of § 1983 litigation will often turn on whether a state or federal forum is selected. To the extent that the states provide greater protection for constitutional rights than federal law would otherwise require, this diversity is not a problem and should be encouraged. But to the extent that the states provide less protection for constitutional rights, as Florida did in this case, the core values of the Supremacy Clause are directly at stake.

Recognizing that fact, this Court has consistently rejected any state rule that undermines the broad remedial purposes of § 1983. *E.g.*, *Felder* v. *Casey*, 108 S.Ct. 2302 (1988). More particularly, this Court has consistently looked at § 1983 itself rather than state law in resolving a broad array of immunity questions over the past two decades. *E.g.*, *Owen* v. *City of Independence*, 445 U.S. 622 (1980). Indeed, this Court has never viewed state law as the source of an immunity defense under § 1983, even when the § 1983 action was initially brought in state court. *See Martinez* v. *California*, 444 U.S. 277 (1980).

It is worth emphasizing the broad scope of the immunity defense that respondents assert in this case. It is not

limited to the state and its agencies. *Cf. Will* v. *Michigan Dep't of State Police*, 109 S.Ct. 2304 (1989). Rather, it extends to cities and counties that are clearly subject to suit in a § 1983 action brought in federal court. *Monell* v. *Dep't of Social Services*, 436 U.S. 658 (1978). Given the distrust for state courts evident throughout the legislative history of § 1983, it is inconceivable that the 42nd Congress intended to confer a broader authority on the states to immunize the unconstitutional policies of cities and counties than it conferred on the federal courts. The federalism interests work in petitioner's favor rather than respondents' under these circumstances. *See Garrett* v. *Moore-McCormack Co.*, 317 U.S. 239 (1942).

What is not clear from the decision below is whether it also bars § 1983 actions against state officers in their individual capacity. Absent a more authoritative statement, this Court should not quickly leap to that conclusion. On the other hand, the decision below cannot stand even if it is construed as an absolute jurisdictional barrier against all § 1983 claims in the Florida courts. At the very least, the existence of concurrent jurisdiction means that the Florida courts may not enforce substantive rules that discriminate against § 1983 suits. *See Testa* v. *Katt*, 330 U.S. 386 (1947). Yet, that is precisely what Florida has done by waiving sovereign immunity for all tort claims other than the constitutional torts embraced by § 1983.

Finally, the state's obligation to enforce federal law does not end with nondiscrimination. Petitioner recognizes that this Court has never definitively resolved whether a state must exercise the concurrent jurisdiction granted by § 1983. But this Court has ruled in other contexts that the states may not decline to exercise jurisdiction over federal claims because they disagree with the

policy choices inherent in federal law. *See Mondou* v. *New York, N.H.&H. R.R.*, 223 U.S. 1 (1912). The attempt to interpose a sovereign immunity defense on the facts of this case represents just such a policy disagreement. Florida may not believe that its cities and counties should be held liable for their constitutional violations; Congress has decided otherwise. Like every other state in the union, Florida is now bound by that congressional decision. *See General Oil* v. *Crain*, 209 U.S. 211 (1908).

ARGUMENT

I. THE SCOPE OF ANY IMMUNITY DEFENSE UNDER § 1983 IS GOVERNED BY FEDERAL LAW REGARDLESS OF THE FORUM IN WHICH THE CASE IS BROUGHT

In the nearly three decades since *Monroe* v. *Pape*, 365 U.S. 167 (1961), this Court has decided numerous immunity cases under § 1983. *See e.g.*, *Forrester* v. *White*, 108 S.Ct. 538 (1988); *Harlow* v. *Fitzgerald*, 457 U.S. 800 (1982); *Owen* v. *City of Independence*, 445 U.S. 622 (1980); *Monell* v. *Dep't of Social Services*, 436 U.S. 658 (1978); *Imbler* v. *Pachtman*, 424 U.S. 409 (1976); *Wood* v. *Strickland*, 420 U.S. 308 (1975); *Scheuer* v. *Rhodes*, 416 U.S. 232 (1974); *Pierson* v. *Ray*, 386 U.S. 547 (1967). Every one of those cases was decided by reference to the meaning and history of the federal statute. Not one was decided on the basis of state law. Respondents nevertheless contend that state law alone determines the scope of sovereign immunity in a § 1983 action brought in state court. This Court's decisions do not support that contention. Indeed, this Court has expressly rejected the very position that respondents now press on at least two separate occasions. *See generally*, Steinglass, *Section 1983 Litigation in State Courts*, § 15.2(d)(1) (1988).

A. The Decision Below Is Inconsistent With The Established Precedents Of This Court

In *Martinez* v. *California*, 444 U.S. 277 (1980), the relatives of a 15 year old girl murdered by a parolee brought a § 1983 action in the California courts against the parole officers who authorized the murderer's release. In response, defendants cited a California statute that provides absolute immunity for parole release decisions. The California courts accepted that defense. This Court, however, unanimously declared "that the California immunity statute does not control this claim even though the federal cause of action is being asserted in the state courts." *Id.* at 284.[6] In an explanatory footnote, Justice Stevens elaborated on the Court's reasoning:

> Conduct by persons acting under color of state law which is wrongful under 42 U.S.C. § 1983 . . . cannot be immunized by state law. A construction of the federal statute which permitted a state immunity defense to have controlling effect would transmute a basic guarantee into an illusory promise; and the supremacy clause of the Constitution insures that the proper construction may be enforced . . . . The immunity claim raises a question of federal law.

Id. at 284 n.8, *quoting Hampton* v. *City of Chicago*, 484 F.2d 602, 607 (7th Cir. 1973), *cert. denied*, 415 U.S. 917 (1974).

Two years ago, in *Felder* v. *Casey*, 108 S.Ct. 2302 (1988), the Court relied on similar reasoning to hold that Wisconsin's notice of claim provision could not be applied to § 1983 actions filed in the state courts:

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[6] Defendants in *Martinez* ultimately prevailed on the alternative ground that plaintiffs had failed to state a due process claim for relief. 444 U.S. at 283-85.

> [A] state law that immunizes government conduct otherwise subject to suit under § 1983 is pre-empted, even where the federal civil rights litigation takes place in state court, because the application of the state immunity law would thwart the congressional remedy, which of course already provides certain immunities for state officials.

Id. at 2307 (citation omitted).[7]

The nature of those immunities was fully explored in *Owen* v. *City of Independence*, 445 U.S. 622 (1980). In particular, *Owen* contains the Court's most extended discussion of the relationship between sovereign immunity and § 1983. That discussion was provoked by the claim of the municipal defendant, who argued that § 1983 did not override the common law distinction between "governmental" and "proprietary" activities, and that when acting in its "governmental" capacity a municipality is therefore entitled to a good faith defense in § 1983 actions. This Court disagreed in an opinion that does not distinguish between state and federal court actions under § 1983. Rather, the Court looked to the purposes of § 1983 in holding:

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[7] The decision below is also inconsistent with the approach followed last Term in *Will* v. *Michigan Dep't of State Police*, 109 S.Ct. 2304 (1989). The majority opinion in *Will* spent considerable time reviewing the language and history of the Civil Rights Act of 1871 as support for its conclusion that states are not "persons" under § 1983. Nothing in the Court's opinion even remotely suggests that sovereign immunity can provide an independent defense to § 1983 actions brought in state court against local governmental entities that qualify as "persons" under the federal statute. To the contrary, the Court explicitly distinguished states from localities for purposes of suit under § 1983 without any indication that the outcome of a § 1983 lawsuit against local government could permissibly turn on whether the action was filed in state or federal court. *Id.* at 2310 n.7.

> the municipality's "governmental" immunity is obviously abrogated by the sovereign's enactment of a statute making it amenable to suit. Section 1983 was just such a statute. By including municipalities within the class of "persons" subject to liability for violation of the Federal Constitution and laws, Congress—the supreme sovereign on matters of federal law—abolished whatever vestige of the State's sovereign immunity the municipality possessed.

445 U.S. at 647-48 (footnote omitted).

The *Owen* Court further noted that "[m]unicipal defenses—including an assertion of sovereign immunity—to a federal right of action are, of course, controlled by federal law." *Id.* at 647 n.30.[8] As support for this proposition, the Court cited the same passage from *Hampton* v. *Chicago* that it had relied on in *Martinez* when discussing the inapplicability of state law defenses in § 1983 actions filed in state court. *See* p.8, *supra*. While not dispositive, the parallel use of an identical precedent in two cases decided only a few months apart strongly suggests that the Court did not perceive, in either *Martinez* or *Owen*, that the supremacy of federal law turned on whether the § 1983 action was brought in federal or state court. *See also Fitzpatrick* v. *Bitzer*, 427 U.S. 445, 455-56 (1976).

Nor should it. This Court has already decided that state courts have concurrent jurisdiction over § 1983 claims.

[8] The existence *vel non* of an immunity defense under § 1983 has been treated by this Court as an issue of statutory construction. *See Briscoe* v. *LaHue*, 460 U.S. 325, 326 (1983). The Court's immunity cases have therefore focused on the history and purposes of the federal statute almost without reference to state law. *E.g.*, *Scheuer* v. *Rhodes*, 416 U.S. 232 (1974). In this case, however, the result would be the same even if one started the analysis with Florida's immunity rules. *See* Herman, "Beyond Parity: Section 1983 and the State Courts," 54 Brooklyn L.Rev. 1057, 1079 n.94 (1989). Pursuant to 42 U.S.C. § 1988, those rules could only be sustained if they were compatible with § 1983. That judgment would ultimately be a matter of federal law. *Cf. Wilson* v. *Garcia*, 417 U.S. 261 (1985).

E.g., *Maine* v. *Thiboutot*, 448 U.S. 1, 3 n.1 (1980). When exercising that jurisdiction, states may not adopt either substantive or procedural rules that conflict with the remedial purposes of § 1983. *Cf. Smith* v. *Wade*, 461 U.S. 30, 55 n.23 (1983) (the scope of § 1983 is a matter of federal law regardless of forum). Thus, "[f]ederal law takes state courts as it finds them only insofar as those courts employ rules that do not 'impose unnecessary burdens upon rights of recovery authorized by federal laws.'" *Felder*, 108 S.Ct. at 2313, *quoting Brown* v. *Western Ry.*, 338 U.S. 294, 298-99 (1949). This is because the Supremacy Clause imposes a constitutional duty on state courts "to proceed in such manner that all the substantial rights of the parties under controlling federal law [are] protected." *Garrett* v. *Moore-McCormack*, 317 U.S. 239, 245 (1942). The assertion of a sovereign immunity defense that is only available in state court plainly does not preserve "all the substantial rights" of a § 1983 plaintiff under federal law.

B. Respondents Would Not Be Shielded By A Sovereign Immunity Defense In Federal Court

There is little doubt that this case could go forward against all respondents, including the district school board, had it been brought in federal court. The Eleventh Amendment bar to federal jurisdiction does not apply to local government units. *See Mt. Healthy City Board of Ed.* v. *Doyle*, 429 U.S. 274, 280 (1977); *Fitzpatrick* v. *Bitzer*, 427 U.S. 445, 456 (1976); *County of Lincoln* v. *Luning*, 133 U.S. 529 (1890). And, after *Monell*, local government units clearly qualify as "persons" for purposes of suit under § 1983.[9]

[9] By dismissing the case on sovereign immunity grounds, the lower courts never reached the question of whether the constitutional violations alleged in this case took place pursuant to a policy or practice that would give rise to liability under *Monell*. That question remains to be explored on remand.

Monell itself involved an issue of municipal liability. This Court, however, has never distinguished between cities and counties in its § 1983 decisions. To the contrary, the Court has often linked the two in discussing the scope of the federal statute. There are sound historical reasons for the Court's approach. Under the Dictionary Act of 1871,[10] the use of the term "person" in § 1983 extended to "public corporations," a phrase that was commonly understood at the time to "include [ ] towns, cities, and counties, but not States." *Will* v. *Michigan Dep't of State Police*, 109 S.Ct. at 2311 n.9.[11] In similar fashion, the controversial Sherman Amendment, which figured so prominently in the debates over § 1983, assumed an equality of status between cities and counties. If adopted, it would have imposed vicarious liability on cities and counties alike for civil rights deprivations caused by their residents. *Monell*, 436 U.S. at 667.

This history, moreover, is amply supported by recent practice. Over the past two decades, this Court has entertained numerous § 1983 suits against local school boards and their officials. *E.g.*, *Hazelwood School District* v. *Kuhlmeier*, 484 U.S. 260 (1988); *Bethel School District* v. *Fraser*, 478 U.S. 675 (1986); *Board of Education* v. *Pico*, 457 U.S. 853 (1982); *Tinker* v. *Des Moines Independent Community School District*, 393 U.S. 503 (1969). Those cases make clear that the jurisdictional question in federal court is whether a local school board "is more like a county or city than it is like an arm of the State." *Mt. Healthy City School District* v. *Doyle*, 429 U.S. 274, 280 (1977). That question, in turn, depends on an interpreta-

[10] Act of Feb. 25, 1871, § 2, 16 Stat. 431.

[11] In both *Will* and *Monell*, this Court looked to the Dictionary Act as an important interpretive guide to § 1983.

tion of the Eleventh Amendment that may be affected by state law but is ultimately governed by federal principles. Here, as in *Mt. Healthy*, the school board is authorized by state law to issue bonds, Fla.Stat. § 236.37, and levy taxes, Fla.Stat. § 236.25. Those independent powers are sufficient to confer federal jurisdiction in a § 1983 suit. *Mt. Healthy*, 429 U.S. at 280.[12]

Finally, it is indisputable that respondents, other than the county school board, could be sued in their individual capacities in federal court regardless of any immunity that might attach to the county school board in its corporate capacity. *See Ex Parte Young*, 209 U.S. 123 (1908).[13] As described more fully below, it is not entirely apparent whether such individual capacity suits are permitted in the Florida courts by the decision in this case. *See* Point IIA, *infra*. Under federal law, however, such suits are plainly permitted so long as any damage award is paid by the individual defendants and not by the state treasury. *Cf. Kentucky* v. *Graham*, 473 U.S. 159 (1985).

In short, petitioner's substantive rights would have been significantly different had this case been filed in federal court.

C. The Decision Below Is Inconsistent With The History And Purpoees Of § 1983

"A major factor motivating the expansion of federal jurisdiction through [§ 1983] was the belief of the 1871

[12] In *Mt. Healthy*, as in this case, local school boards were deemed "political subdivisions" of the state. 429 U.S. at 280. However, that fact was not controlling in *Mt. Healthy* and should not be controlling here.

[13] The complaint in this case does not specifically indicate whether the individual respondents are being sued in their individual or official capacities. That is not unusual and should not foreclose recovery if petitioner can show at trial that respondents were personally liable for any constitutional violations that occurred.

Congress that the state authorities had been unable or unwilling to protect the constitutional rights of individuals or to punish those who violated these rights." *Patsy* v. *Florida Board of Regents*, 457 U.S. 496, 505 (1982). That distrust was targeted as much at state courts as it was at state law enforcement. *Id.* at 506 & n.9. Given this history it defies commonsense to argue, as respondents must in this case, that the 42nd Congress intended to defer to the authority of the states to shield state officials from § 1983 liability through the imposition of state common law immunities.[14]

For reasons this Court discussed at length in *Owen*, respondents' reliance on sovereign immunity is also at odds with the compensatory purposes of § 1983. If the sovereign cannot be sued, there will often be no meaningful remedy for those who suffer as a result of the "[m]isuse of power, possessed by virtue of state law and made possible only because the wrongdoer is clothed with the authority of state law . . . ." *United States* v. *Classic*, 313 U.S. 299, 326 (1941). The fact that the offending officer can be personally sued does not solve the problem. "[O]wing to the qualified immunity enjoyed by most government officials, many victims of municipal malfeasance would be left remediless if the city were also allowed to

[14] Presented with an analogous contention in *Felder*, this Court observed:

> Given the evil at which the federal civil rights legislation was aimed, there simply is no reason to suppose that Congress meant "to provide these individuals immediate access to the federal courts notwithstanding any provision of state law to the contrary," yet contemplated that those who sought to vindicate their federal rights in state courts could be required to seek redress in the first instance from the very state officials whose hostility to those rights precipitated their injuries.

108 S.Ct. at 2311 (footnote omitted) (citations omitted).

assert a good-faith defense." *Owen*, 445 U.S. at 651 (citation omitted). Here, of course, the problem is magnified by the absolute immunity that respondents propose for all government bodies sued in state court.

In addition, it is no answer that petitioner could have filed his § 1983 action in federal court and avoided the difficulties that he has encountered in this case. The same is true every time the state erects a barrier to the vindication of federal rights in state court. Petitioner had a right to choose his forum and having chosen state court he had a right to insist that the state court respect the ultimate supremacy of federal law, *see Martinez* v. *California*, including the interest in uniformity that this Court has identified as an important aspect of supremacy under the civil rights statutes.

"A law that predictably alters the outcome of § 1983 claims depending solely on whether they are brought in state or federal court is obviously inconsistent with this federal interest in intra-State uniformity." *Felder*, 108 S.Ct. at 2314. Yet, that is precisely the impact of the immunity rules applied by the court below. Under those rules, "the outcome of federal civil rights litigation will frequently and predictably depend on whether it is brought in state or federal court." *Id.* at 2313.[15] Faced

[15] The obverse is equally true, as *Felder* points out. When federal courts exercise diversity jurisdiction over state law claims, "the outcome of the litigation should be substantially the same, so far as legal rules determine the outcome of a litigation, as it would be if tried in a State court." *Guaranty Trust Co.* v. *York*, 326 U.S. 99, 109 (1945). Thus, as *Felder* recognized, the supremacy issue presented by this case is, in many ways, a reverse *Erie* problem. 108 S.Ct. at 2313. Neither *Felder* nor this case, however, forecloses a state court from treating § 1983 actions more liberally than a federal court. *Id.* At the very least, different policy considerations would apply under those circumstances. *See generally*, Herman, *supra* n.8.

with that prospect, the *Felder* Court held:

> [T]he very notions of federalism upon which respondents rely dictate that the State's outcome- determinative law must give way when a party asserts a federal right in state court.

Id.

This case is governed by the same principle.[16]

II. THE DECISION BELOW MUST BE REVERSED EVEN IF IT IS VIEWED AS A JURISDICTIONAL BAR TO § 1983 SUITS IN THE STATE COURTS

As described more fully below, it does not appear that the Florida courts have declined jurisdiction over § 1983 claims. Rather, it appears that the Florida courts have decided to entertain *only* those § 1983 actions that are deemed compatible with the state's own definition of sovereign immunity. Such selective enforcement of federal law is invalid under *Felder* and *Martinez*. It is unnecessary, therefore, to reach the question of whether a state could decline § 1983 jurisdiction entirely.[17] However, even if this case is approached in jurisdictional terms, the decision below cannot stand. First, it violates the principle of nondiscrimination. Second, it reflects a policy disagreement between state and federal law that must be resolved in favor of the federal interest under the Supremacy Clause.

A. The Decision Below Does Not, On Its Face, Foreclose Jurisdiction Over § 1983 Claims

The decision below is hardly a model of clarity. Thus, it is difficult to say with great assurance how far the sovereign immunity defense accepted by the court below may actually extend. For present purposes, it is sufficient to note that it bars § 1983 suits in state court against cities, counties and local school boards. So far as one can tell, it also departs from this Court's Eleventh Amendment jurisprudence by barring injunctive relief against state officials engaged in an ongoing violation of constitutional rights. *See Edelman* v. *Jordan*, 415 U.S. 651 (1974). It does not, on its face, bar jurisdiction over § 1983 claims. But it does indisputably foreclose whole categories of § 1983 litigation that are routinely prosecuted in the federal courts.

[16] For similar reasons, the limits on liability embodied in Fla.Stat. § 768.28(5) should be deemed inapplicable in state court § 1983 actions.

[17] *See Martinez*, 444 U.S. at 283 n.7.

The justification for this asymmetrical result ostensibly rests on the decision by the Florida Supreme Court in *Hill* v. *Dep't of Corrections*, 513 So.2d 129 (1987). In fact, the immunity principles applied in this case by Florida's intermediate appellate court go far beyond anything *Hill* actually decided. The narrow issue in *Hill* was "whether a civil rights suit under 42 U.S.C. § 1983 can be brought against the state and one of its agencies in a Florida court." *Id.* at 131. Writing prior to *Will*'s holding that states are not persons under § 1983, *Hill* analyzed that question in terms of the state's traditional sovereign immunity. In particular, the *Hill* court found no reason to believe that the drafters of § 1983 intended the states to suffer *greater* liability in state court than federal court. And since a suit against the state (or one of its agencies) would be barred in federal court under the Eleventh Amendment, the *Hill* court concluded that it was likewise barred in state court under the doctrine of sovereign immunity. The court also disposed of the question of waiver, by stating:

> While Florida is at liberty to waive its immunity from section 1983 actions, it has not done so. The recovery

> ceilings in section 768.28 were intended to waive sovereign immunity for state tort actions, not federal civil rights actions commenced under section 1983.

513 So.2d at 133.[18]

The careful analogy in *Hill* between sovereign immunity and the Eleventh Amendment does not on its face support the ruling below, which extended the concept of sovereign immunity in § 1983 actions to cities, counties, and local school boards. Rather, that extension appears to be based on the lower court's assumption that the language of § 768.28 determines, through negative implication, the scope of the sovereign immunity defense to a § 1983 action in the Florida courts. Because § 768.28 expressly waives the immunity of the state, its agencies, and "subdivisions," the court below apparently reasoned that these same entities are, *ipso facto*, insulated from suit in circumstances where sovereign immunity has not been waived—namely, § 1983 suits.[19]

Petitioner recognizes that this Court cannot resolve disputed questions of state law. Nevertheless, the uncer-

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[18] The relevant text of Fla.Stat. § 768.28 is set out in the Appendix. *Cf. Florida Dep't of Health and Rehabilitative Services* v. *Florida Nursing Home Ass'n*, 450 U.S. 147, 150 (1981) (Florida's "general waiver of sovereign immunity" is not a waiver of its Eleventh Amendment immunity).

[19] This has not been the uniform view of the Florida courts. *See e.g., The Franklin County School Board* v. *Page*, 540 So.2d 891 (1st DCA 1989) (holding that local government units do not enjoy a sovereign immunity from § 1983 suits in the state courts); *City of Riviera Beach* v. *Langevin*, 522 So.2d 857 (4th DCA 1988) (same); *Southern Alliance Corp.* v. *City of Winter Haven*, 505 So.2d 484 (2d DCA 1987) (same). *But see Lloyd* v. *Ellis*, 520 So.2d 59 (1st DCA 1988) (dismissing suit against county sheriff and investigator in their official capacities).

tain foundation of the decision below cautions against a broad reading that would also foreclose, *sub silentio*, § 1983 actions against government officials in their individual capacities. Neither *Hill* nor the decision in this case addressed that question directly. Under the circumstances, it is far more reasonable to assume that petitioner's complaint was dismissed in its entirety because the court below assumed, improperly in our view, that respondents were sued in their official capacities only.[20] That interpretation would also be consistent with the decision of other Florida appellate courts that have adhered to the distinction between individual and official capacity suits under § 1983. *See Lloyd* v. *Ellis*, 520 So.2d 59, 60 (1st DCA 1988); *Skoblow* v. *Ameri-Manage, Inc.*, 483 So.2d 809 (3d DCA 1986), *aff'd on other grounds*, 514 So.2d 1077 (1987).[21] It is also consistent with the structure of § 768.28. Under that section of Florida law, government employees cannot be sued if a cause of action is available against their employer. If the government employer is immune from suit, as the court below held in this case, then the bar against suing the employee presumably disappears as well. At the moment, therefore, the fairest reading of Florida law seems to be that the state courts remain open to § 1983 suits against individual officers but closed (at least in the Second District) to

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[20] *See* n.3, *supra*.

[21] Even more significantly, the Second District Court of Appeal, which issued the opinion below, has reviewed other individual capacity suits under § 1983 both before and since this case without relying on the doctrine of sovereign immunity. *See P.C.B. Partnership* v. *The City of Largo*, 549 So.2d 738 (2d DCA 1989); *Carpenter* v. *City of St. Petersburg*, 547 So.2d 339 (2d DCA 1989); *Penthouse, Inc.* v. *Saba*, 399 So.2d 1095 (2d DCA 1981).

§ 1983 suits against *any* governmental body under an expansive view of sovereign immunity.[22]

B. States May Not Enforce Jurisdictional Rules That Discriminate Against Federal Claims

If construed in jurisdictional terms, the ruling below represents the starkest example of state discrimination against federal claims that this Court has ever reviewed. As explained by the Florida Supreme Court in *Hill*, the doctrine of sovereign immunity retains its validity in Florida only for constitutional torts. 513 So.2d at 132-33. They alone are barred. For all other torts, the state has waived its sovereign immunity pursuant to Fla.Stat. § 768.28.[23]

The scope of this partial waiver was aptly summarized by the Eleventh Circuit in *Gamble* v. *Florida Dep't of Health and Rehabilitative Services*, 779 F.2d 1509, 1515 (11th Cir. 1986): "We agree . . . that § 768.28, when viewed alone, was intended to render the state and its agencies liable for damages for traditional torts under state law, but to exclude such liability for 'constitutional torts.'" Five years earlier, the district court was even

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[22] The Florida courts have also continued to review on the merits applications for attorney's fees under 42 U.S.C. § 1988. *E.g.*, *Steinberg* v. *City of Sunrise*, 545 So.2d 424 (4th DCA 1989); *Hoffmeister* v. *Coler*, 544 So.2d 1067 (4th DCA 1989); *The Franklin County School Board* v. *Page*, 540 So.2d 891 (1st DCA 1989). That response is inconsistent with the notion that the Florida courts have declined jurisdiction to hear all § 1983 claims.

[23] This discrepancy would not be critical for § 1983 had the doctrine of sovereign immunity been limited to damage claims against the state and its agencies. Under those circumstances, the decision in *Hill* would have done little more than presage this Court's opinion in *Will*. It becomes absolutely critical in light of the lower court's ruling that the doctrine of sovereign immunity also extends to cities, counties, and local school boards.

more explicit in *Shinholster* v. *Graham*, 527 F.Supp. 1318, 1332 (N.D.Fla. 1981): "[T]he Florida legislature's intent to limit the waiver of sovereign immunity solely to tort claims and to the exclusion of federal civil rights suits is abundantly clear." As a result, a resident of Florida who is run over by a police car may sue the city for negligence. A resident of Florida who is unconstitutionally searched pursuant to municipal policy has no recourse against the municipality in the Florida courts.

Such differential treatment of state and federal claims violates a principle of nondiscrimination that is more than fifty years old. In *McKnett* v. *St. Louis & S.F. Railway*, 292 U.S. 230 (1934), the Alabama courts declined to exercise jurisdiction over an out-of-state accident under the Federal Employers' Liability Act, 45 U.S.C. § 51, *et seq.*, although foreign corporations were generally permitted access to the Alabama courts for actions arising under the laws of other states. This Court reversed in an opinion written by Justice Brandeis:

> While Congress has not attempted to compel states to provide courts for the enforcement of the Federal Employers' Liability Act, the Federal Constitution prohibits state courts of general jurisdiction from refusing to do so solely because the suit is brought under a federal law. The denial of jurisdiction by the Alabama court is based solely upon the source of law sought to be enforced. The plaintiff is cast out because he is suing to enforce a federal act. A state may not discriminate against rights arising under federal laws.

292 U.S. at 233-34 (citations omitted).

The Court reached a similar conclusion in *Testa* v. *Katt*, 330 U.S. 386 (1947). The plaintiff in *Testa* brought suit in the Rhode Island state courts to recover the purchase

price of an automobile that was above and beyond the wartime price controls set by the Emergency Price Control Act. The trial court awarded treble damages plus attorney's fees. The Rhode Island Supreme Court, however, concluded that it lacked jurisdiction to enforce the "penal" statutes of a "foreign government" notwithstanding the fact that similar statutes enacted by Rhode Island were routinely enforced in its state courts. Once again, this Court disagreed:

> It is conceded that this same type of claim arising under Rhode Island law would be enforced by that State's courts . . . Thus the Rhode Island courts have jurisdiction adequate and appropriate under established local law to adjudicate this action. Under these circumstances the State courts are not free to refuse enforcement of petitioners' claim.

Id. at 394 (footnotes omitted).[24]

Most recently, in *Felder*, the discriminatory impact of Wisconsin's notice of claim provision was cited by the Court as one of the reasons for its invalidity. 108 S.Ct. at 2308. The discrimination there was not against federal claims *per se;* rather, it was a discrimination in favor of governmental defendants who, the Court noted, were "the very persons and entities Congress intended to subject to liability" through § 1983. *Id.* at 2310. "This defendant-specific focus of the notice requirement," the Court wrote, "serves to distinguish it, rather starkly, from rules uniformly applicable to all suits." *Id.*

The discrimination in this case suffers the worst defects of *McKnett* and *Testa*, on the one hand, and *Felder*, on the

[24] The holding in *Testa* was expressly reaffirmed in *Federal Energy Regulatory Commission (FERC)* v. *Mississippi*, 456 U.S. 742, 760 (1982).

other. Like *McKnett* and *Testa*, the ruling below carves an exception from the general jurisdiction of the state courts that only applies to certain federal claims. And like *Felder*, the ruling below insulates from liability the very defendants that § 1983 was designed to reach. Neither discrimination is valid; both together are fatal to Florida's scheme.

C. States May Not Enforce Jurisdictional Rules That Reflect A Substantive Disagreement With Policies Inherent In Federal Law

A state's obligation to enforce federal law does not end with nondiscrimination. Although this Court has never definitively resolved whether a state must exercise the concurrent jurisdiction granted by § 1983,[25] the principles governing that judgment are well-established. Absent a "valid excuse," Florida may not decline to hear federal claims because it regards its own state interests as superior to federal law.[26] And a state's substantive disagreement with federal law does not represent a "valid excuse."[27]

These benchmarks were most clearly set forth in *Mondou* v. *New York, N.H. & H. Railroad*, 223 U.S. 1 (1912). The Connecticut courts in that case had refused to accept

[25] *See Maine* v. *Thiboutot*, 448 U.S. at 3 n.1; *Martinez* v. *California*, 444 U.S. at 283 n.7.

[26] *See* Bator, Meltzer, Mishkin & Shapiro, *Hart and Wechsler's Federal Courts and the Federal System* 499 (1988).

[27] Steinglass, *supra*, at § 9.3(c). Applying these rules, many commentators have concluded that the states are required to hear § 1983 claims. *E.g.*, Gordon & Gross, "Justiciability of Federal Claims in State Court," 59 Notre Dame L.Rev. 1145, 1156-71 (1984); Neuborne, "Toward Procedural Parity in Constitutional Litigation," 22 Wm. & Mary L.Rev. 725, 759-66 (1981).

jurisdiction over FELA claims on the ground that the theory of liability embodied in the Act was inconsistent with state policy and that, as a result, it would be confusing for state judges to apply two different theories of liability depending on whether a state or federal claim was advanced. In an era when the theory of coordinate sovereignty still carried force, *see Kentucky* v. *Dennison*, 65 U.S. 66 (1861), this Court nonetheless rejected Connecticut's approach:[28]

> The suggestion that the act of Congress is not in harmony with the policy of the state, and therefore that the courts of the state are free to decline jurisdiction, is quite inadmissible, because it presupposes what in legal contemplation does not exist. When Congress, in the exertion of the power confided to it by the Constitution, adopted that act, it spoke for all the people and all the states, and thereby established a policy for all. That policy is as much the policy of Connecticut as if the act had emanated from its own legislature, and should be respected accordingly in the courts of the state.

223 U.S. at 57.[29] Thus, the Court concluded: "The existence of the jurisdiction creates an implication of duty to exercise it, and that its exercise may be onerous does not militate against that implication." *Id.* at 58.

General Oil Co. v. *Crain*, 209 U.S. 211 (1908), reflects a similar view. Indeed, it is perhaps even more directly on

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[28] The theory of coordinate sovereignty held that states heard federal actions solely as a matter of comity. It was expressly rejected in *FERC* v. *Mississippi*, 456 U.S. at 763 n.28.

[29] *See also Claflin* v. *Houseman*, 93 U.S. 130, 136 (1876) (federal and state governments may be distinct sovereignties but that "is no reason why the State Courts should not be open for the prosecution of rights growing out of the laws of the United States, to which their jurisdiction is competent, and not denied").

point because, like the present case, it involved the assertion of sovereign immunity as a basis for declining state jurisdiction over a federal constitutional claim. The issue arose in a suit seeking to enjoin Tennessee officials from collecting a local tax that plaintiff contended impermissibly burdened interstate commerce. The validity of the tax was ultimately upheld. But in an opinion issued on the same day as *Ex Parte Young*, 209 U.S. 123 (1908), this Court refused to accept Tennessee's sovereign immunity defense:

> If a suit against state officers is precluded in the national courts by the 11th Amendment to the Constitution and may be forbidden by a state to its courts, as it is contended in the case at bar that it may be, without power of review by this court, it must be evident that an easy way is open to prevent the enforcement of many provisions of the Constitution; and the 14th Amendment, which is directed at state action, could be nullified as to much of its operation.

209 U.S. at 226.[30]

Here, the only plausible justification for Florida's use of an expansive sovereign immunity defense to bar petitioner's § 1983 claim is that Florida disagrees with the federal policy decision to make local governments liable for the constitutional violations their policies create. *Felder* provides the short answer to that objection:

> The decision to subject state subdivisions to liability for violations of federal rights . . . was a choice that Congress, not the [Florida] legislature, made, and it

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[30] *Crain* cannot be dismissed as a case in which no forum would have been available if the state courts were closed. The Court's simultaneous decision in *Ex Parte Young* assured that the federal courts would be available to hear constitutional claims against state officials.

> is a decision that the State has no authority to override. Thus, however understandable or laudable the State's interest in controlling liability expenses might otherwise be, it is patently incompatible with the compensatory goals of the federal legislation, as are the means the State has chosen to effectuate it.

108 S.Ct. at 2309.

In fact, this is a more compelling case than *Felder* since, in *Felder*, it was at least theoretically possible to have a § 1983 claim heard in its entirety in the state courts so long as one complied with the notice of claim provisions. That possibility did not exist for petitioner in this case. The invalidity of such a total ban was therefore assumed in *Felder*, when the Court said:

> States . . . may no more condition the federal right to recover for violations of civil rights than *bar that right altogether*, particularly where those conditions grow out of a waiver of immunity which, however necessary to the assertion of state-created rights against local governments, is entirely irrelevant insofar as the assertion of federal right is concerned, and where the purpose and effect of those conditions, when applied in § 1983 actions, is to control the expense associated with the very litigation Congress has authorized.

Id. at 2309-10 (citation omitted) (emphasis added).

Moreover, this is not a context in which the Court need or should search for a "clear statement" from Congress before insisting that Florida exercise its jurisdiction over petitioner's § 1983 claim. The "clear statement" rule was developed by this Court in Eleventh Amendment cases. *See Atascadero State Hospital* v. *Scanlon*, 473 U.S. 234, 242 (1985). It is not the test that this Court has used in allocating jurisdiction between the federal and state

courts,[31] or in deciding which attributes of a federal cause of action apply in state court.[32] Nor does this case present the sort of legal issue that "alter[s] the 'usual constitutional balance between the States and the Federal Government.'" *Will*, 109 S.Ct. at 2308 (citation omitted). The Court resolved in *Monell* that local governments are amenable to suit under § 1983. Given that holding, respondents' jurisdictional objection to enforcing *Monell* in the state courts must now be assessed in terms of its compatibility with the remedial purposes of § 1983. The decision below never even considered those purposes and thus discounted entirely the federal interest in uniform application of § 1983. It is not surprising that this distorted calculus led the court below to the erroneous conclusion that each state is free, as a matter of state law, to determine whether local governments are protected by sovereign immunity from a § 1983 action in the state courts.

Finally, the decision below overlooks the important policy reasons supporting state jurisdiction over § 1983 claims. In part, those reasons are related to caseload. Without an available state forum, civil rights plaintiffs "would have no choice but to bring their complaints concerning state actions to federal courts." *Maine* v. *Thiboutot*, 448 U.S. at 11 n.12.[33] But, far more impor-

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[31] *See Gulf Offshore Co.* v. *Mobil Oil Corp.*, 453 U.S. 473, 477-78 (1981) (federal courts do not have exclusive jurisdiction over personal injury actions arising under the Outer Continental Shelf Lands Act).

[32] *See Dice* v. *Akron, Canton & Youngstown Railroad Co.*, 342 U.S. 359 (1952) (jury's factfinding role in FELA action brought in state court is governed by federal law).

[33] Although there are no precise statistics, most commentators agree that the number of state court § 1983 actions has increased dramatically in recent years. *See* Steinglass, "The Emerging State Court § 1983 Action: A Procedural Review," 38 Miami L.Rev. 381 (1984).

tantly, state court § 1983 actions offer one way to ensure that the enforcement of federal constitutional rights will be seen, and acted upon, as a shared responsibility of the states and national government. For civil rights plaintiffs, the benefits of that system of shared responsibility are perhaps obvious. However, it is equally beneficial for the states themselves since it provides a mechanism through which the constitutional misdeeds of local officials can be corrected without the intervention of the federal courts. In so doing, § 1983 furthers the broadest principles of federalism that would be seriously disserved if states could effectively opt out of any meaningful role in constitutional review.

CONCLUSION

For the reasons stated herein, the judgment below should be reversed and remanded for further proceedings.

Respectfully submitted,

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APPENDIX

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CONSTITUTIONAL AND STATUTORY PROVISIONS

Article VI of the United States Constitution provides, in relevant part:

> This Constitution, and the Laws of the United States which shall be made in Pursuance thereof; and all Treaties made, or which shall be made, under the Authority of the United States, shall be the supreme Law of the Land; and the Judges in every State shall be bound thereby, any Thing in the Constitution or Laws of any State to the Contrary notwithstanding.

42 U.S.C. § 1983 provides, in relevant part:

> Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress.

Fla. Stat. § 768.28 provides, in relevant part:

> (1) In accordance with s. 13, Art. X, State Constitution, the state, for itself and for its agencies or subdivisions, hereby waives sovereign immunity for liability for torts, but only to the extent specified in this act. Actions at law against the state or any of its agencies or subdivisions to recover damages in tort for money damages against the state or its agencies or subdivisions for injury or loss of property, personal injury, or death caused by the negligent or wrongful act or omission of any employee of the agency or subdivision while acting within the scope of his office or employment under circumstances in which the state or such agency or subdivision, if a private person, would be liable to the claimant, in accordance with the general laws of this state, may be prosecuted subject to the limitations in this act. Any such action may be brought in the county where the

property in litigation is located or, if the affected agency or subdivision has an office in such county for the transaction of its customary business, where the cause of action accrued.

(2) As used in this act, "state agencies or subdivisions" include the executive departments, the Legislature, the judicial branch (including public defenders), and the independent establishments of the state; counties and municipalities; and corporations primarily acting as instrumentalities or agencies of the state, counties, or municipalities.

* * * *

(5) The state and its agencies and subdivisions shall be liable for tort claims in the same manner and to the same extent as a private individual under like circumstances, but liability shall not include punitive damages or interest for the period before judgment. Neither the state nor its agencies or subdivisions shall be liable to pay a claim or a judgment by any one person which exceeds the sum of $100,000 or any claim or judgment, or portions thereof, which, when totaled with all other claims or judgments paid by the state or its agencies or subdivisions arising out of the same incident or occurrence, exceeds the sum of $200,000. However, a judgment or judgments may be claimed and rendered in excess of these amounts and may be settled and paid pursuant to this act up to $100,000 or $200,000, as the case may be; and that portion of the judgment that exceeds these amounts may be reported to the Legislature, but may be paid in part or in whole only by further act of the Legislature. Notwithstanding the limited waiver of sovereign immunity provided herein, the state or an agency or subdivision thereof may agree, within the limits of insurance coverage provided, to settle a claim made or a judgment rendered against it without further action by the Legislature, but the state or agency or subdivision thereof shall not be deemed to have waived any defense of sovereign immunity or to increased the limits of its liability as a result of its obtaining insurance coverage for tortious acts in excess of the $100,000 or $200,000 waiver provided above. The limitations of liability set forth in this subsection shall apply to the state and its agencies and subdivisions

whether or not the state or its agencies or subdivisions possessed sovereign immunity before July 1, 1974.

* * * * *

(9)(a) No officer, employee, or agent of the state or of any of its subdivisions shall be held personally liable in tort or named as a party defendant in any action for any injury or damage suffered as a result of any act, event, or omission of action in the scope of his employment or function, unless such officer, employee, or agent acted in bad faith or with malicious purpose or in a manner exhibiting wanton and willful disregard of human rights, safety, or property. However, such officer, employee, or agent shall be considered an adverse witness in a tort action for any injury or damage suffered as a result of any act, event, or omission of action in the scope of his employment or function. The exclusive remedy for injury or damage suffered as a result of an act, event, or omission of an officer, employee, or agent of the state or any of its subdivisions or constitutional officers shall be by action against the governmental entity, or the head of such entity in his official capacity, or the constitutional officer of which the officer, employee, or agent is an employee, unless such act or omission was committed in bad faith or with malicious purpose or in a manner exhibiting wanton and willful disregard of human rights, safety, or property. The state or its subdivisions shall not be liable in tort for the acts or omissions of an officer, employee, or agent committed while acting outside the course and scope of his employment or committed in bad faith or with malicious purpose or in a manner exhibiting wanton and willful disregard of human rights, safety, or property.

* * * * *

(16) No provision of this section, or of any other section of the Florida Statutes, whether read separately or in conjunction with any other provision, shall be construed to waive the immunity of the state or any of its agencies from suit in federal court, as such immunity is guaranteed by the Eleventh Amendment to the Constitution of the United States, unless such waiver is explicitly and definitely stated to be a waiver of the immunity of the state and its agencies from suit in

federal court. This subsection shall not be construed to mean that the state has at any time previously waived, by implication, its immunity, or that of any of its agencies, from suit in federal court through any statute in existence prior to June 24, 1984.